Supreme Court of the United States

OCTOBER TERM, 1955.

No. 674.

ROSE ALEXANDER,

Petitioner,

vs.

IRVING TRUST COMPANY, as Executor under the Last Will and Testament of CLARENCE P. OBERNDORF, Deceased, and COLUMBIA UNIVERSITY PRESS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The issues dispositive of this case turn solely on questions of fact. Petitioner now seeks to have this Court assume the role of trier of those facts.

Petitioner claimed that respondents had copied her literary work, and had thereby violated her rights under the copyright laws and had tortiously caused damage to her.

All facts were found against petitioner. The District Court in an opinion (annexed to Petition, 18-26*), which was unanimously adopted by the Court of Appeals (*id.*, 27-8), found that there had been no access to plaintiff's work; that there were no similarities indicating copying;

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* Also to be found at pp. 3-11 of Appellant's Appendix and at 132 F. Supp. 364; affirmance reported, 228 F. 2d 221.

that the book of Dr. Oberndorf, the respondent author, was the result of independent labor without appropriation of any of plaintiff's matter; and further that the matters on the dust cover of the second edition of respondents' book (Appellant's Appx., 80-1, Ex. 10), "were a fair use of comments * * *" and "an accurate description," of the work and that "[n]either in any way reflect upon or injure plaintiff."

The only reason assigned in the present petition for granting a writ relates to the claim of tort based on the statements on the cover of the second edition of Dr. Oberndorf's book which petitioner continues to insist are false, despite the findings to the contrary.

The opinion of the District Court sets forth the facts fully; it is appropriate, however, to note the following:

Petitioner's sole contribution to literature or science was to set forth in her approximately 1600-word article, written to interest general practitioners to whom "psychiatry is very distasteful" (Appellant's Appx., 56, 65; R. 360, 388), the theory that Holmes' novels showed an understanding of psychiatry that was half a century ahead of his time, to which she

> "adds a few historical facts from both Holmes' life and the history of medicine. The references to the novels themselves are in general terms. The novels are neither summarized nor completely analyzed to establish the basis for plaintiff's conclusions" (Opinion, in Petition at p. 19).

Her work was unknown to Dr. Oberndorf when he published his book (*id.*, 21-2); nor was the theory new with her (*id.*, 25).

Dr. Oberndorf, on the other hand, in his 270-page volume, intended as a text book for medical students and the laity

(Appellant's Appx., 68-9; R. 407-8), "made a painstaking analysis of all three of Holmes' novels showing their practical application in terms of present-day psychiatric knowledge * * *. [It] was entirely original in its presentation of each of Holmes' three novels, abridged with a view to highlighting their significance as psychiatric and analytic studies of neuroses" (Opinion, see Petition, 19-20).

Plaintiff never sold anything written by her (Appellees' Appx., 2; R. 366). Her article, here involved, was contributed without compensation to a minor medical magazine (Appellant's Appx., 42; R. 319).

As any argument that facts should be found differently than they have been by the District Court and the Court of Appeals is without foundation, even were it material, it would not be proper to expand this brief in order to correct the inaccuracies in petitioner's statement of facts. The opinion of the District Court supplemented by the above short statement suffices to that end.

With the foregoing background, the futility of the sole "Reason for Granting Writ" assigned by petitioner becomes obvious.

Argument.

Petitioner indulges in a labored and fallacious argument based in part on her conception of *International News Service* v. *Associated Press,* 248 U. S. 215, and in part on the assumption that the pertinent facts in the present case are diametrically opposite to the findings of the lower courts (Petition, 10-17).

The net result of this is petitioner's conclusion that she should have injunctive relief because "a competitor in phychiatric practice and literature seized and used * * * the result of *her* labor and expense" [emphasis is peti-

tioner's] and caused others to be "deceived by his larceny" (*id.*, 16-17). This factual assertion is contrary to the findings of the District Court and the Court of Appeals, previously noted herein.

There is no inconsistency between the *International News* case and the present decision. The cited case turned upon the theory of *misappropriation* of a competitor's property or efforts. Here we have the finding that there was *no* appropriation.

The asserted erroneous interpretation by the Court of Appeals for the Second Circuit of the *International News* decision exists only in the mind of petitioner's counsel. Indeed, when Judge Learned Hand wrote the first of the opinions which counsel criticizes, *R. C. A. Mfg. Co.* v. *Whiteman*, 114 F. 2d 86 (Petition, 11) an attempt was made to secure a review by this Court, which denied the petition for certiorari then made (311 U. S. 712). In any event the asserted general error which petitioner assigns to the Court of Appeals in other cases does not affect the instant case, where the lower courts have found that there has been no appropriation by a competitor of the industry, skill or expense of another.

Finally, whether or not given conduct is tortious as petitioner asserts is solely a question of state law (*Fashions Originators' Guild* v. *Federal Trade Comm.*, 312 U. S. 457, 468). Except upon a definite showing of error as to the state law, this Court accepts the interpretation placed upon it by a local federal judge. (*Steele* v. *General Mills*, 329 U. S. 433, 439; *Helvering* v. *Stuart*, 317 U. S. 154, 163.) No such error is even adverted to in the present petition. Indeed, even were there no other reason therefor, the New York state law would have compelled dismissal of the instant complaint for failure to allege and prove special damages. (*Roger* v. *McCloskey*, 305 N. Y. 75; *Frawley Chem. Corp.* v.

A. P. Larson Co., 274 App. Div. 643; *Eversharp, Inc.* v. *Pal Blade Co.*, 182 Fed. 2d 779, 2d Circ.)

In short, there has not been advanced by petitioner a tenable reason of any sort, and, *a fortiori*, a special and important one, for review on writ of certiorari.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID ASCH,
Counsel for both respondents.